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HAROLD B. WILLEY, Cle

No. 644

IN THE

SUPREME COURT

OF THE

United States

October Term, 1954

VERN GEORGE DAVIDSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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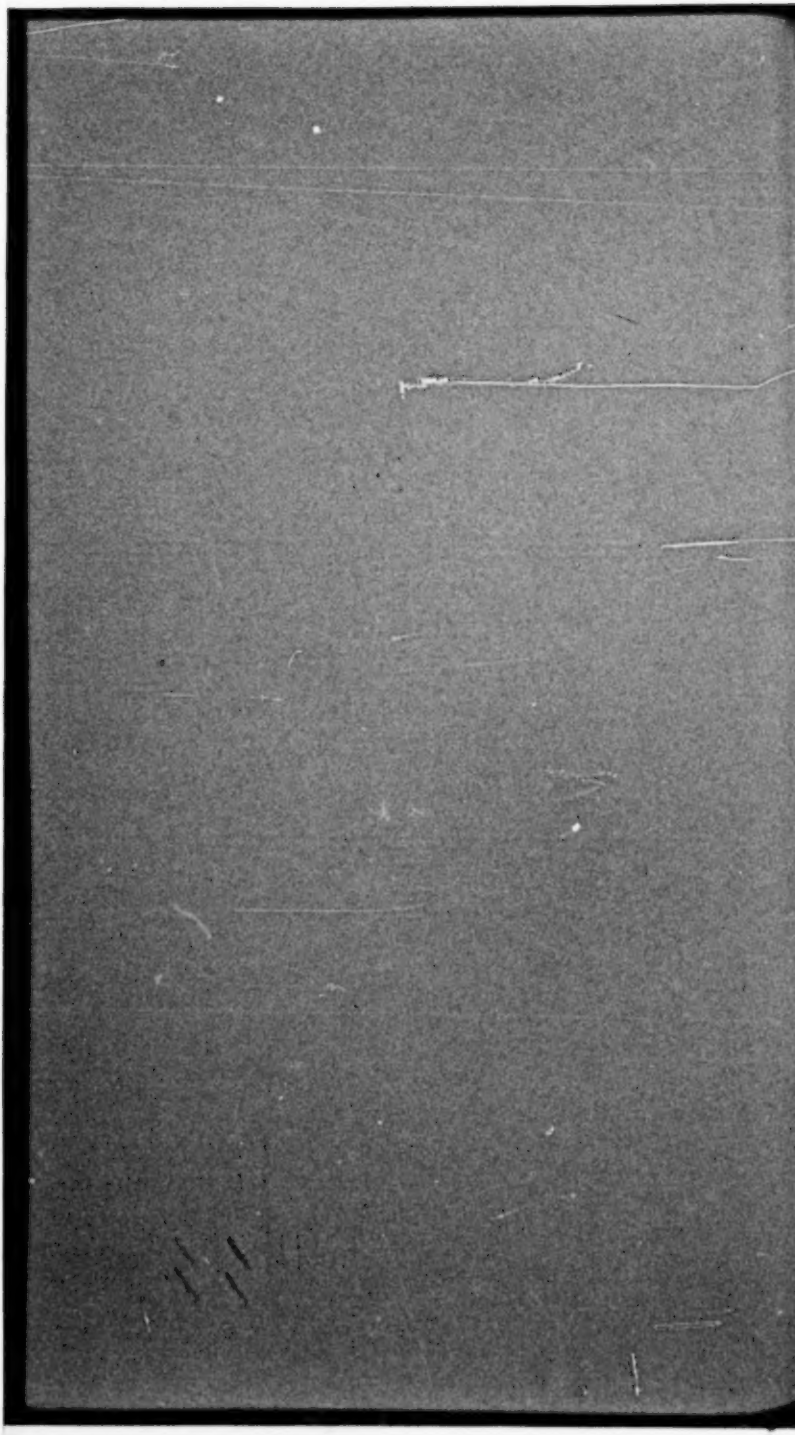

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Southern District of California, Central Division, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW:

The opinion of the United States Court of Appeals is not yet reported. It is in the Record, pages 105-110. It is also Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION.

The judgment of the Court of Appeals was entered on December 27, 1954 [R. 111;* also see Appendix B to this petition].

The final judgment of the Court of Appeals (denial of the seasonably filed Petition for Rehearing) was entered on February 11, 1955. [R. 112; also see Appendix C to this petition]. The petition for writ of certiorari is filed within the required thirty days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U. S. C. The district court has jurisdiction under 18 U. S. C. §3231.

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*All references to the Transcript of Record are designated by pages of it, as follows: [R. 3]. The entire Selective Service File of appellant was entered in evidence as Government's Exhibit 1. All references to the file are designated by pages of Exhibit 1, as follows: [Ex. 3]; the pagination of Exhibit 1 is by a one-quarter inch high pencilled number, circled, and ordinarily is found at the bottom of each sheet of Exhibit 1.

3. QUESTIONS PRESENTED AND HOW RAISED.

I.

The record shows that upon petitioner's second appeal to the Selective Service Appeal Board there was no hearing conducted by the Hearing Officer of the Department of Justice (although petitioner appeared at the place and at the time set forth in the order to appear) as required by the Act and Regulations in cases of appeals by registrants professing conscientious objections to all military training and service, both combatant and non-combatant.

The question presented is whether, on a second administrative appeal (over 18 months having elapsed) a second hearing officer hearing is required to determine the current *bona fides* of the registrant's professions of conscientious objection to war. Also involved here is whether the local board's decision to grant petitioner a second appeal (which progressed to the actual door of the second Hearing Officer), was a correct construction of petitioner's request for relief (as petitioner claims) or was an improvident decision, justifying the abortive outcome of petitioner's second appellate attempt. This portion of the question was raised by the decision of the Court below. [App. A].

This point and the following ones were raised by oral motions for judgment of acquittal. [R. 21, 29 and 71.]

II.

The record shows that before trial petitioner caused to be subpoenaed the secret FBI investigative report. The Government moved to quash the subpoena. This motion was granted. [R. 23-24.] The motion of the petitioner to examine the FBI report was denied. [R. 23-24.]

In the motion for judgment of acquittal, complaint was made that the failure to compel the production of the FBI report had deprived petitioner of due process of law.

The question presented here, therefore, is whether the trial court committed reversible error in failing and refusing to permit the secret FBI investigative report to be examined and used by the petitioner upon the trial for the purpose of showing that the Los Angeles hearing officer and the Attorney General (after the first and/or second appeal) had failed to give a full, fair and adequate summary of the adverse information appearing in the report as required by due process of law, the Act and Regulations. This question is before the Court in *Simmons vs. United States,* No. 251, October Term, 1954, argued orally early in February, 1955.

III.

The third question is whether petitioner was deprived of fair hearings before the appeal board on both his appeals when the board acted upon the adverse recommendations made by the Department of Justice, without first giving him an opportunity to answer.

IV.

The undisputed evidence is that the local board failed to have available an Advisor to Registrants and to have posted conspicuously or any place, the names and addresses of such advisor, as required by the Regulations, Section 1604.41. [R. 41-49]

The question presented is whether this violation of law alone, or in connection with other circumstances in evidence constituted a denial of due process.

V.

The record shows that petitioner from the first asserted: "I do conscientiously object to war and to conscription for any reason." [Ex.p 11.] However, he repeatedly stated he didn't believe in a "Supreme Being." [Ex. p. 20.]

The law requires that a registrant establish that he believes in a Supreme Being.

The question presented is whether the law discriminates against religions that do not believe in a Supreme Being and against registrants whose religion is not one that is expressed in orthodox terms.

4. STATUTES AND REGULATIONS INVOLVED.

Article VI §3 of the United States Constitution is involved; also Amendments I and V.

Section 1 (c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) §451 (c)) is involved. Also, Section 6 (j) of the Act must be considered (50 U. S. C. App. (Supp. V) §456 (j), 65 Stat. 75, 83, 86), and §12 (a).

Sections 1604.41, 1604.71, 1622.1 (d), 1622.11, 1622.14, 1625.1 (a), 1626.25 and 1626.26 of the Regulations (32 C. F. R.) are involved.

All sections of the Act and of the Regulations, not set forth in the argument, are printed as Appendix D, below.

5. STATEMENT OF THE CASE.

Petitioner was indicted on July 8, 1953 under U. S. C. Title 50, App. Sec. 462—Selective Service Act, as amended 1951, for refusing to submit to induction [R. 3].

Petitioner was convicted by Judge Harry C. Westover, jury trial having been waived, on November 30, 1953 [R. 6-14]; he was sentenced by said judge to a 3-year term of imprisonment on December 7, 1953 [R. 15-16].

In the court below as well as before the Selective Service agencies, and the Department of Justice appellant claimed to be a conscientious objector to all participation in military activities and that he was en-

titled to a classification as such. His initial claim was made in his Classification Questionnaire [Ex. 4-18]; this was on October 20, 1948. The Classification Questionnaire is the first opportunity a registrant has to make such an avowal.

To his Questionnaire he added explanations of his answers.

> "It will be noted that I have not completed the Second statement in this series. I would like to make it clear that I feel that no humanitarian or democrat should ask or should answer such a question. Such a question has its basis in the prejudice and discrimination that now dominated the armed forces of this country. Therefore I consider my race as my own business and shall refuse to answer this question under any circumstances." [Ex. 10.]

Series XIV of the Questionnaire is to be signed by all registrants who profess to be conscientious objectors. It is in essence a request to be sent the selective service document entitled Special Form for Conscientious Objector. Petitioner signed Series XIV [Ex. 15] and wrote, after his signature, "See note attached."

On pages 11, 12 and 13 of the Exhibit we find this note; it contains a copy of a letter he had sent to his college paper, preceded by the following:

> "It will be noted that I have signed series XIV. I would like to make my position clear. I do conscientiously object to war and to conscription for any reason. But, my beliefs are not religious, they are basicly [*sic*] political. As a political objector

I shall resist this totalitarian move by my own country as I would resist it in any other country. My position is briefly stated in the attached newspaper article by myself. If after considering these facts the board feels that they wish to send me the form for conscientious objectors, I will be glad to fill it out and return it to the board with the understanding that my objections are not religious but political."

He was then 19 years and 2 months old.

The Minutes of Actions [Ex. 10] reveal the following facts: The local board sent him the form; he executed and filed it on February 27, 1950; he was classified in Class I-A on July 12, 1950; his appeal was honored and the appeal board, after a preliminary finding [required by the then existing regulation] asked the United States Attorney to procure an advisory recommendation from the Department of Justice. The request is on page 32 of the Exhibit. This was the standard procedure where the registrant's request for a conscientious objector classification was not granted by the local board or by the appeal board on its first (preliminary) consideration. The then Government regulation, §1626.25 plus the Attorney General's practice, provided for: (1) an extensive FBI investigation (secret), (2) a Hearing Officer's report to the Attorney General (a copy according to the then existing practice, being placed in the registrant's selective service file; see pages 36-41), and (3) an Attorney General's recommendation to the Appeal Board (copy being placed in the file; see page 35).

The Hearing Officer informed the Attorney General that he believed petitioner seems to be sincere [Ex. 40] but concluded that he was not religious in his beliefs or that his beliefs were based on his early religious training. He noted that petitioner's ideas were "of rather recent origin. During his first two years in the university he took military training. All reports are that he is of good personal character." [Ex. 39].

Petitioner was then 21 years of age.

The Hearing Officer, the Attorney General and the Appeal Board agreed that he should not receive a conscientious objector classification, the Appeal Board Classification of I-A being on February 13, 1951.

Petitioner was ordered to report for induction but, by reason of his scholastic work, the order was postponed. [Ex. 43—.]

Thereafter, once again he requested relief, on November 6, 1951 [see Ex. page 58], and, after his appeal was honored, the Appeal Board requested the United States Attorney to secure an advisory opinion from the Attorney General. During the subsequent investigating period petitioner submitted evidence to support a claim advanced for an occupational deferment; petitioner had left school and taken employment as the National Secretary and Organizer for the Young Peoples' Socialist League [see Ex. page 59, 61, 62].

Petitioner testified in court that the following occurred during this investigatory period and before the Attorney General sent his letter of recommendation to

the Appeal Board on July 29, 1952: [R. 51-52, 75-87; stipulation: 83-86].

> He was instructed by Nathan Freedman, Hearing Officer of the Department of Justice to appear before him in Los Angeles on May 19, 1952 for the hearing officer hearing but, because petitioner was employed in New York at the time he asked to have the hearing transferred to a New York Hearing Officer; the hearing was transferred and a New York Hearing Officer named Gallagher notified him to come to his office for the hearing. Petitioner appeared before the Hearing Officer. He was informed by Mr. Gallagher that the hearing had been cancelled. This was almost two years after the "Los Angeles" hearing before Mr. Ray Files. He testified that his occupation had meanwhile changed and that his views with respect to religious objection to war had matured. [R. 52]. No hearing was ever held to hear about this.
>
> Petitioner was then one month short of being 23 years of age.

After the cancellation of the July 23, 1952 hearing by the New York hearing officer, the Attorney General sent the file to the Appeal Board with his recommendation that the petitioner not be classified as a conscientious objector [Ex. 64-65].

Thereafter petitioner was ordered to report for induction on October 17, 1952. [Ex. 69].

Upon his verbal refusal to submit [Ex. 72] and his written statement to the same effect [Ex. 73] he was indicted, as aforesaid.

6. REASONS FOR GRANTING THE WRIT.

I.

An important question presented by this petitioner has not been determined by this Court but should be.

It is whether a selective service registrant, professing to be a conscientious objector, is entitled to a second hearing officer hearing during the process of a second admininstrative appeal.

The undisputed evidence shows that petitioner was not given a hearing officer hearing, in Brooklyn, on July 23, 1952; the only reason diclosed is the explanation given petitioner, when he asked the hearing officer "Why?" "Because you already had a hearing." [R. 52.]

The law and the regulations make the hearing mandatory on an appeal.

> *United States v. Nugent,* 73 S. Ct. 991;
> *Sterrett v. United States,* 216 F. 2d 659;
> Sec. 6(j) U.S.C. 50 App.

Petitioner received all other of the administrative appellate steps on his second appeal except the hearing. Heretofore, the Department of Justice always agreed with General Hershey that each time he appealed a registrant was entitled to the so-called "special" appellate procedure for conscientious objectors.

> "The Department of Justice and Selective Service took the position that *each* time the case of a registrant who claimed to be a conscientious objec-

> tor came before the board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct application of the law. In addition such *reference was necessary because new factors* in the case might be brought to light by the Department's investigation and hearing." (Emphasis added.)
>
> See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. 1, page 150, Washington, Government Printing Office, 1950. Also see pages 147 and 155.

The Attorney General misconstrued the law when he denied petitioner the second hearing. The fact that petitioner already had had a hearing did not excuse the denial of the *re-examining* hearing since (1) so much time had elapsed after the first hearing, and (2) the intent of the law is that *all* the facts are to be re-examined by a Hearing Officer.

The Court of Appeals held that petitioner's second appeal was abortive. The Court of Appeals concluded that the second appeal was abortive because (a) it was not *from* a classification, but *for* a postponement of induction and because (b) it came too late in that it postdated an order to report for induction; 32 Code of Federal Regulations, §1626.2(d) is given as authority.

With respect to

(a) It has been held that a liberal construction is required of a Selective Service registrant's phraseology in letters to his draft board: *Cox v. Wedemeyer,* 192 F. 2d 920, 923; *Talcott vs. Read,* 217 F. 2d 310; *Hufford*

vs. United States, 103 F. Supp. 859, 862; *Berman vs. Craig,* 107 F. Supp. 529, 531 (Aff. by 3 Cir., 207 F. 2d 888); *Ex parte Fabiani,* 105 F. Supp. 193, 149.

It cannot be doubted that petitioner's letter of "Appeal" was one asking his local board for relief. The Board so understood it and also understood that an administrative appeal was his remedy. The board's construction of his letter should not be rejected unless illegal. This brings us to the next problem.

(b) A registrant's untimely request for an administrative appeal is not a nullity. If the local board believes the registrant is asking for and should have an appeal it may waive the tardiness of the request. The very section cited by the opinion, §1626.2(d), states that the local board may honor a late appeal. Since the sub-section (d) itself makes the Order to Report for Induction the deadline, and in the same paragraph gives the local board authority to honor a late appeal it is clear that Davidson's local board exercised its authority and intended him to have an appeal.

II.

An important and as yet undetermined question is involved here in the exclusion from evidence of the secret FBI investigative report. A very similar question is involved in *Simmons vs. United States,* No. 251, October Term, 1954. The writ was granted in that case.

III.

The undisputed evidence was that the recommendations by the Department of Justice to the appeal board

were both made without copies or notice to petitioner. The petitioner also testified that he did not know about the unfavorable recommendation until after the appeal board determination. [R. 51.]

In the motion for judgment of acquittal it was contended that the action taken by the appeal board in accepting the recommendation of the Department of Justice and denying the conscientious objector status without giving petitioner the right to answer the unfavorable recommendation was a deprivation of procedural due process of law. [R. 30, 71-72.]

The question here presented, therefore, is whether the use of the unfavorable recommendation by the Department of Justice to the appeal board and the denial of the conscientious objector status without giving petitioner an opportunity to answer the unfavorable recommendation were a deprivation of petitioner's rights to a full and fair hearing contrary to due process of law guaranteed by the fair and just provisions of the Act and the Fifth Amendment to the United States Constitution. This question is involved in *Gonzales vs. United States,* No. 69, October Term, 1954, argued orally early in February, 1955.

IV.

Another question as yet undetermined by this court is involved: whether the conceded failure of the local board to have Advisors to Registrants coupled with his below-stated need for advice constitutes a denial of due process.

Petitioner asserted to his local board that he didn't believe in a Supreme Being and that he didn't have religious beliefs. Two experts on religion were prepared to testify that petitioner's problem was one of his rebellious semantics, that he actually had religious beliefs based on religious training and that his beliefs concerning a creative force could be considered within the congressional requirement. [R. 35-39.]

It was also undisputed that petitioner never received any advice from any selective service officials and never knew he could obtain advice from them. [R. 63, 58, 51.]

V.

An important constitutional question involved and not yet decided is whether the innovation in the 1948 law, the so-called "Supreme Being Clause" offends the VIth Article (3rd clause) and/or the First Amendment.

Petitioner is personally affected by this clause in the Act and is in a position to raise this question for he informed the selective service system, on his classification questionnaire, that he didn't believe in a Supreme Being. [Ex. 20.] The law requires that a registrant believe in a Supreme Being to qualify for a conscientious objector classification. [§6(j)] The Department of Justice recommended to the appeal board that petitioner be denied a conscientious objector classification because he didn't qualify under the law.

CONCLUSION

This petition should be granted for one or more of the three reasons herein stated.

Respectfully submitted,

J. B. TIETZ,
Counsel for Petitioner.

March, 1955.